STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0732

State of Minnesota,
Respondent,

vs.

Alberto Betancourt, Jr.,
Appellant.

Filed December 30, 2013
Affirmed
Stoneburner, Judge

Clay County District Court
File No. 14CR122590

Lori A. Swanson, Attorney General, St. Paul, Minnesota; and

Brian J. Melton, Clay County Attorney, Lori H. Conroy, Assistant County Attorney, Moorhead, Minnesota (for respondent)

Christopher J. Cadem, Cadem Law Group, P.L.L.C., Fergus Fall, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Hooten, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant challenges his convictions of three counts of felony domestic assault in violation of Minn. Stat. § 609.2242, subd. 4 (2010), alleging that procedural and

substantive errors require reversal and remand for a new trial. Appellant also challenges his sentence on procedural grounds and argues that, if he is not granted a new trial, his sentence should be reversed and the matter remanded for resentencing. We affirm.

FACTS

In July 2012, appellant Alberto Betancourt Jr. was living in a mobile home owned by his mother at a mobile-home park in Glyndon. Late one evening, a fight broke out in the mobile home among Betancourt, his pregnant sister, A.S., A.S.'s husband, D.S., and Betancourt's 18-year-old brother, M.B. D.S. ran next door to the residence of C.G. and asked C.G. to call 911 because there were "people flipping out at his house." D.S. left C.G.'s residence while C.G. was making the call.

Glyndon Police Officer Jason Lien responded to the call. D.S. answered the door and said that the fight was over and that the officer could enter. Officer Lien saw injuries on the left side of D.S.'s face. He saw another man, later identified as M.B., on the couch with significant facial injuries. Officer Lien applied first aid to M.B. and called for an ambulance. Officer Lien also saw that A.S. had a golf-ball-sized lump over her left eye that was black and blue. Officer Lien observed that all of the injuries were recent. He photographed the facial injuries and also photographed what he opined were defensive injuries on D.S.'s hands.

Officer Lien learned from the victims that everyone involved in the altercation lived in the mobile home. Betancourt had come home with a woman and argued with A.S. Betancourt hit A.S. D.S. intervened to protect her. D.S. and Betancourt then exchanged blows. M.B. became involved, and Betancourt struck him several times in the

face. D.S. pulled Betancourt off of M.B. D.S. and Betancourt again exchanged blows until D.S. told Betancourt to leave because the police were being called. Betancourt left with the woman, who was not identified in these proceedings.

After the police left the mobile home, D.S. again went to C.G.'s residence and told him that Betancourt had left in a black Kia automobile. D.S. asked C.G. to call the police again if the black Kia returned to the mobile home. Officer Lien and other officers returned to the mobile home after C.G.'s second call. The officers found Betancourt in the mobile home. Betancourt was arrested and charged with three counts of felony domestic assault.

While he was in jail awaiting trial, Betancourt made numerous telephone calls to one individual. All of the telephone calls were recorded pursuant to jail policy. The state obtained recordings of all of the conversations, which were in Spanish.

The state contacted Pedro Rodriguez to translate the conversations. Rodriguez had worked as a jailer for 17 ½ years, during which time he had acted as a translator for the Clay County Sheriff's Department as needed. Rodriguez, who is not a court-certified interpreter, listened to two compact discs, one containing recordings of 28 conversations and the other containing recordings of eight conversations between Betancourt and a woman. The recordings were never transcribed, but Rodriguez made notes about the contents of the telephone calls. Over Betancourt's objection to lack of foundation, the district court allowed Rodriguez to testify from his notes, at a pretrial *Crawford* hearing and at trial, about the identity of the speakers and the content of the conversations. Rodriguez's notes were not offered into evidence.

Rodriguez testified that he identified Betancourt's voice from his own knowledge of Betancourt. He identified the woman in the recordings as Betancourt's mother, based on Betancourt's addressing her as his mother during the conversations. Rodriguez testified that, in several of the conversations, Betancourt asked his mother to get the victims to recant and say that he never hurt them. He also asked her to get witnesses to testify in his favor, and he and his mother discussed delaying the trial.

The state served D.S., A.S., and M.B. with subpoenas for Betancourt's trial by leaving the documents with A.M., an adult, at the mobile home where the fight occurred. None of the victims appeared for trial. The district court issued arrest warrants, and law-enforcement officers attempted unsuccessfully to locate the victims to bring them to court.

The district court conducted a *Crawford* hearing to determine whether Betancourt had forfeited his confrontation rights by procuring the unavailability of the witnesses. The state offered evidence to establish that the witnesses had been served with subpoenas and that the state had acted with diligence to procure their attendance. To support its argument that Betancourt's wrongful conduct had procured the unavailability of the witnesses, the state offered Rodriguez's testimony about Betancourt's telephone conversations with his mother and evidence of statements that D.S. made to his probation officer and a representative of the county attorney's office's victim-services program that family members pressured him not to cooperate with the prosecution. The district court held that Betancourt had forfeited his Sixth Amendment right to confront these witnesses by procuring their unavailability for trial and granted the state's request to admit the

statements of A.S. and D.S. recorded by Officer Lien at the mobile home on the night of the incident.

Prior to trial, Betancourt moved in limine to prevent the state from impeaching him with two prior felony domestic-assault convictions in the event that he testified. The district court reserved ruling until the second day of trial, when, based on its analysis of relevant factors, the district court denied the motion and held that Betancourt could be impeached with these convictions. Betancourt did not testify at trial.

The jury found Betancourt guilty of all three charges. Betancourt moved for a downward dispositional or durational sentencing departure. At the sentencing hearing, he intended to offer the testimony of jail staff, whom he had subpoenaed, about his good behavior and peaceful temperament while in custody. He also intended to offer testimony from A.S.

The district court, having received evidence that Betancourt had acted as a trustee at the jail and concluding that it would have received a report had Betancourt's behavior in custody been other than good, quashed the subpoenas issued for jail staff. The district court sua sponte refused to allow A.S. to testify because she had failed to appear at trial. At the sentencing hearing, Betancourt personally addressed the district court in fluent English. The district court denied Betancourt's motion for a sentencing departure and sentenced him to concurrent sentences of 24, 27, and 30 months in prison. This appeal followed.

D E C I S I O N

I. The district court did not err in concluding that Betancourt forfeited his Sixth Amendment right to confront A.S. and D.S.

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that a defendant in a criminal case has the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. With one exception—forfeiture-by-wrongdoing—the Confrontation Clause bars the admission of a witness's out-of-court testimonial statement unless the witness is unavailable and was previously subject to cross examination by the defendant. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004); *State v. Cox*, 779 N.W.2d 844, 850 (Minn. 2010). This court considers whether the district court's admission of evidence violated the defendant's Confrontation Clause rights de novo. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

On appeal, the state argues that the statements Officer Lien took from A.S. and D.S. at the scene of the crime are not testimonial and therefore do not implicate the Confrontation Clause. We disagree.

The United States Supreme Court has categorized "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" as testimonial. *Id.* (quoting *Crawford*, 541 U.S. at 51-52, 124 S. Ct. at 1354). And the Minnesota Supreme Court has stated that "the critical determinative factor in assessing whether a statement is testimonial is whether it was prepared for litigation." *Id.* at 309.

When Officer Lien took statements from A.S. and D.S. there was no ongoing emergency and Officer Lien was gathering evidence potentially relevant in a future criminal prosecution of the identified assailant. Therefore, the statements are testimonial. *See State v. Wright*, 726 N.W.2d 464, 476 (Minn. 2007) (holding that the statements victims made to police after police responded to a 911 call were testimonial because "the police interviews in this case occurred after the emergency had ended and were conducted in order to establish events potentially relevant to the future prosecution of" the defendant).

It is undisputed that the confrontation clause generally would bar admission of A.S. and D.S.'s out-of-court statements because neither A.S. nor D.S. has been subject to cross examination by Betancourt and they did not appear for trial. But the forfeiture-by-wrongdoing exception extinguishes confrontation claims; a defendant who has wrongfully and intentionally procured the unavailability of a witness cannot assert that his right to confrontation has been violated by admission of a witness's out-of-court statement. *State v. Fields*, 679 N.W.2d 341, 347 (Minn. 2004).

The supreme court has stated that the forfeiture-by-wrongdoing exception requires the state to prove, by a preponderance of the evidence "(1) that the declarant-witness is unavailable, (2) that the defendant engaged in wrongful conduct, (3) that the wrongful conduct procured the unavailability of the witness and (4) that the defendant intended to procure the unavailability of the witness." *Cox*, 779 N.W.2d at 851. The district court applied this exception to admit the statements of A.S. and D.S. Betancourt argues that

the state failed to prove any of the factors necessary to the application of the forfeiture-by-wrongdoing rule. We disagree.

A. Unavailability of witnesses

"A witness is not 'unavailable' for Confrontation Clause purposes, 'unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.'" *Id.* at 852 (quoting *Barber v. Page*, 390 U.S. 719, 724-25, 88 S. Ct. 1318, 1322 (1968)). The extent to which the state must go to ensure that a witness appears for trial "is a question of reasonableness." *Id.* (quotation omitted).

Appellant argues that A.S. and D.S. were not unavailable for trial because (1) the witnesses were not properly served with subpoenas and (2) the state focused on finding only D.S. on the day of the trial. At the *Crawford* hearing, the state presented testimony from several witnesses, including the Glyndon police chief and the sergeant in charge of court security at the courthouse, to establish that the witnesses were properly served and that the state made reasonable efforts to secure their appearance.

1. The witnesses were properly served

The Minnesota Rules of Criminal Procedure provide that "[s]ervice of a subpoena on a person must be made by delivering a copy to the person or by leaving a copy at the person's usual place of abode with a person of suitable age and discretion who resides there." Minn. R. Crim. P. 22.03. At the time of the incident, A.S. and D.S. told Officer Lien that they and M.B. lived at the mobile home. The sheriff's department served the subpoenas on A.S., D.S., and M.B. at the mobile home by leaving subpoenas with one of Betancourt's brothers-in-law, an adult named A.M., who is known to local police to

periodically reside at that address. The record supports the district court's finding that the witnesses were properly served by leaving the subpoenas with A.M. at the mobile home.

2. Reasonable efforts to locate the witnesses for trial

The police chief testified that he went to the mobile home after he learned that the witnesses had failed to appear. He testified that two of Betancourt's sisters were at the home and allowed him to look through the home. He did not locate the witnesses in the mobile home. The sergeant in charge of court security testified that he notified the sheriff's warrants office after he learned the witnesses failed to appear. He testified that several deputies attempted to locate the witnesses. When the deputies did not find the witnesses at the address listed on the subpoenas, they talked to D.S.'s father, who told them that he believed that they were at an address in Hendrum. The deputies proceeded to that address, but did not find the witnesses. A person at the Hendrum address told the deputies that the witnesses were at the mobile home in Glyndon. We conclude that the record supports the district court's finding that the state made good-faith reasonable efforts to find the witnesses and bring them to the trial.[1]

[1] There is limited evidence about the state's efforts to find M.B. other than looking for him at the mobile home. But because M.B. did not make a statement to police, the district court did not admit a statement from him. Therefore, Betancourt does not have a Confrontation Clause challenge relating to M.B., and any error in the district court's finding that M.B. was unavailable is harmless error. *See Cox*, 779 N.W.2d at 852 (stating that Confrontation Clause violations are subject to harmless-error analysis).

B. Wrongful conduct intended to procure unavailability of the witnesses

1. Wrongful conduct

Betancourt argues that even if the evidence about the content of his conversations with his mother is admissible, those conversations do not constitute evidence of wrongful conduct or that he intended to procure the unavailability of the witnesses. He asserts that his request to his mother to have the witnesses change their statements is consistent with his right to be presumed innocent and was only a plea to have the witnesses be truthful. But, in addition to evidence of Betancourt's conversations asking his mother to get the witnesses to change their statements, the record contains evidence of D.S.'s statements to his probation officer and the victims-services representative that he and A.S. were pressured by relatives not to cooperate with the prosecution. D.S. never claimed that the statements made to Officer Lien were incorrect. In fact, he told his probation officer that he and A.S. felt that the state had enough evidence to go forward without involving them in a trial.

"While defendants have no duty to assist the [s]tate in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system." *Davis v. Washington*, 547 U.S. 813, 833, 126 S. Ct. 2266, 2280 (2006). A defendant's witness-tampering conduct may constitute wrongful conduct. *See Fields*, 679 N.W.2d at 347 (affirming the district court's determination that the defendant forfeited confrontation rights by engaging in wrongful misconduct consisting of threatening telephone calls from the jail); *State v. Black*, 291 N.W.2d 208, 214 (Minn. 1980) (affirming the district court's finding that the defendant forfeited his right to

confront the victim when she refused to testify because he intimidated her into silence), *abrogation on other grounds recognized by State v. Jones*, 556 N.W.2d 903, 909 n.4 (Minn. 1996). In *Cox*, the supreme court explained that "[t]he forfeiture-by-wrongdoing exception is aimed at defendants who intentionally interfere with the judicial process." 779 N.W.2d at 850. We conclude that the record supports the district court's finding that Betancourt engaged in wrongdoing that intentionally resulted in the unavailability of A.S. and D.S.

2. Intent to procure unavailability

Betancourt argues that his conversations do not support a finding that he intended to procure the unavailability of A.S. and D.S., citing the reference in *Cox* to *Giles v. California*, 554 U.S. 353, 128 S. Ct. 2678 (2008), which states that an element of the forfeiture-by-wrongdoing exception is proof that the defendant intended to procure the unavailability of the witness. *Id.* at 851. In *Cox*, the supreme court concluded that the witness was not unavailable because the witness actually responded to the state's subpoena but was not called as a witness. *Id.* at 852. Because the intent element of the exception was not an issue in *Cox*, the opinion does not elaborate on this element.

In *Giles*, the district court allowed the state to introduce statements at Giles's trial for murder that the victim had made approximately three weeks prior to the homicide based on its holding that Giles forfeited his right to confront the victim because his murder of the victim made the victim unavailable to testify. 554 U.S. at 356-57, 128 S. Ct. at 2681-82. The United States Supreme Court reversed and remanded with directions for the district court to consider whether Giles had, at the time of the murder, the

particular purpose of making the witness unavailable." *Id.* at 367, 128 S. Ct. at 2687 (quotation omitted). *Giles* does not limit the manner in which intent to procure unavailability can be established. We conclude that proof of intent to procure unavailability is satisfied in this case by evidence of Betancourt's wrongful conduct that was plainly intended to undermine the judicial process and demonstrates that Betancourt reasonably expected to make A.S. and D.S. unavailable as state's witnesses for trial. Because the record shows that Betancourt engaged in conduct that was intended to result in the unavailability of A.S. and D.S., the district court did not err by concluding that Betancourt forfeited his right to confront these witnesses.

II. The district court's evidentiary rulings do not constitute an abuse of discretion.

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

A. Admission of evidence of content of jail telephone calls

Betancourt challenges the admission of Rodriguez's testimony about the content of the jail recordings of his telephone conversations with his mother. He contends that because Rodriguez is not a court-certified interpreter, did not take the interpreter's oath, and was not neutral, the district court abused its discretion by allowing Rodriguez's testimony. Betancourt cites Minn. Stat. § 611.33 (2012), which relates to the

qualifications of a court interpreter who translates proceedings for a person who is disabled in communication.[2] But Betancourt is not disabled in communication. The record reflects that he is fluent in English. And Rodriguez was not acting as a court interpreter for anyone in this trial. The interpreter statute is not relevant to this proceeding.

Rodriguez appeared as a witness for the state and took an oath to tell the truth. He testified about his background and experience in translation. He was subject to cross examination about the content and context of the statements made in Spanish in the telephone calls and about his translation ability.

Betancourt's objection to the district court allowing Rodriquez to summarize only portions of the conversations without introducing transcripts of the entire calls is without merit because he appears to have made a tactical decision not to require the state to produce such transcripts. Betancourt did not challenge the accuracy of any particular translation. Instead, he chose to infer, in cross examination, that the translations *might* not be accurate and that the context of statements *might* affect their interpretation. Under the circumstances of this case, we conclude that the district court did not err in permitting the state's witness to testify about the content of the conversations without requiring a transcript of the conversations.

[2] A "person disabled in communication" includes a person who "cannot fully understand the proceedings or any charges made against the person" or is incapable of participating in his or her defense due to "difficulty in speaking or comprehending the English language." Minn. Stat. § 611.31 (2012).

Betancourt also argues Rodriguez's testimony was not relevant because it only related to Betancourt's credibility, and he did not testify. The record does not reflect that Betancourt objected to Rodriguez's testimony on the basis of relevance and he has not argued plain error, therefore the argument is waived on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) ("This court generally will not decide issues which were not raised before the district court."). But even if we were to reach the issue, the testimony was relevant to explain why the victims did not appear to testify at trial.

B. Admission of statements relating to 911 calls

Betancourt argues that the district court abused its discretion by admitting C.G.'s testimony about the 911 calls, which, he asserts, constitutes hearsay. Hearsay is an out-of-court statement that is offered for the truth of the matter asserted. Minn. R. Evid. 801(c). Hearsay is generally inadmissible, unless an exception provided by the rules of evidence applies. Minn. R. Evid. 802.

Betancourt specifically objects to admission of D.S.'s statement to C.G. that "the guy that started the fight had stolen their vehicle and taken off." But the state did not offer this statement or any of C.G.'s statements to prove the truth of the statements but rather to explain why law enforcement went to the mobile home initially and why they returned. The district court correctly held that the statements were not hearsay and did not abuse its discretion by admitting C.G.'s statements.

C. Admissibility of Betancourt's prior convictions for impeachment

Evidence of a defendant's prior conviction is admissible for purposes of impeachment if the crime is punishable by more than one year in prison and the probative

value outweighs the prejudicial effect. Minn. R. Evid. 609(a)(1). To determine whether the probative value of prior-conviction evidence outweighs its prejudicial effect, courts consider the following factors:

> (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of [the] defendant's testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978). This court will not reverse a district court's ruling on the impeachment of a witness by a prior conviction absent an abuse of discretion. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998).

After considering the *Jones* factors on the record, the district court held that Betancourt's prior felony convictions were admissible for impeachment purposes. Betancourt argues on appeal that the district court ruling constitutes an abuse of discretion and that it prevented him from testifying. We disagree.

We have repeatedly rejected the claim asserted by Betancourt that convictions that do not implicate veracity do not have impeachment value. *See State v. Hill*, 801 N.W.2d 646, 652 (Minn. 2011) ("[*A*]*ny* felony conviction is probative of a witness's credibility, and the mere fact that a witness is a convicted felon holds impeachment value."). And because Betancourt's convictions occurred only slightly more than two years before the charges in this matter, they are recent enough to have probative value. *See State v. Davis*, 735 N.W.2d 674, 680 (Minn. 2007) (noting that recent convictions have more probative value than older convictions). The convictions are for the same crimes charged in this

case, but the district court found that the underlying facts of the prior convictions are not similar to the facts of this case and therefore this factor weighed in favor of admission. Because the district court did not rule on whether the nature of the prior convictions would be admitted, it is difficult to determine on review whether the district court's determination on this factor is an abuse of discretion. *See State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006) (stating that the more similarity there is between the alleged offense and the defendant's past conviction, "the more likely it is that the conviction is more prejudicial than probative"). As the state asserted at oral argument on appeal, any prejudice could have been cured by admitting only the fact of the prior convictions without identifying the nature of the convictions. Without such a limitation, this factor would weigh against admission. Betancourt's credibility was a central issue, which weighs in favor of admission. *See id.* **(**"If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions.") . Because at least four of the five *Jones* factors weigh in favor of admission, the district court did not abuse its discretion by ruling that Betancourt could be impeached with the prior convictions.

D. Exclusion of evidence at sentencing hearing

Minn. R. Crim. P. 27.03, subd. 1(A)(7)(c), provides that the district court "must allow the record to be supplemented with relevant testimony" at the sentencing hearing. Betancourt subpoenaed a jail employee to testify at the sentencing hearing about his good behavior while in custody. The state moved to quash the subpoena. Betancourt asserts

that he was denied a fair sentencing hearing because the district court quashed the subpoenas.

But Betancourt explained at the sentencing hearing that he subpoenaed the jail staff because he was unable to obtain certain records from the jail about his behavior while in jail. He acknowledged that, prior to the sentencing hearing, he had received the report he was seeking. The report was admitted into evidence and establishes that Betancourt had been an in-house trustee at the jail for 94 days and served 564 hours. The district court quashed the subpoenas after hearing from both parties, stating, "It seems to me, we're a small county . . . . If one of our inmates has a problem in jail, they usually lose their privileges and then the [c]ourt gets a copy of the report. . . . I haven't heard anything about any problems with [Betancourt] in the jail." Under these facts, the district court did not abuse its discretion by quashing the subpoenas. Even if we could conclude that the district court abused its discretion by quashing the subpoenas, Betancourt cannot establish any prejudice because the evidence he sought to admit by subpoenaing witnesses was admitted.

Betancourt also intended to present testimony from A.S., but the district court sua sponte held that A.S. could not testify, stating: "She was subpoenaed and didn't show up so I'm certainly not going to allow her to testify here." We are not able to conclude that this ruling prejudiced Betancourt or prevented him from fully addressing his departure motion because Betancourt failed to make an offer of proof at the sentencing hearing about the expected content of A.S.'s testimony other than to state that she would testify "with respect to sentencing but also issues relating to treatment of [Betancourt]." And

Betancourt has not explained on appeal how he was prejudiced by exclusion of A.S.'s testimony, arguing instead that the district court erred by finding that A.S. was unavailable at trial. On this record, we find no merit to Betancourt's challenge to the fairness of his sentencing hearing based on these evidentiary rulings.

Affirmed.